Petition

81-1886

Supreme Court, U.S.
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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

H. B. SANDINI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether petitioner's rights under the Fifth Amendment to the Constitution of the United States were violated by the trial court's decision to admit testimony of a convicted coconspirator, when that witness was being represented by the same attorney who had been privileged to full disclosure by the petitioner at an earlier time, but in reference to the same matter.

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Introduction.

Petitioner was convicted largely on the basis of testimony given at trial by one James Iouna. Mr. Iouna typified the modern trend in government prosecutorial methods; *i.e.*, he was a previously convicted, but as yet unsentenced, coconspirator. As such, Mr. Iouna was assured that, in return for his testimony against the petitioner, the Government would recommend a lenient sentence. Naturally, Mr. Iouna agreed

to testify. Up to that point, the scenario had not been an unusual one. Mr. Iouna, however, added one unusual ingredient to the mixture, and it is that ingredient which results in this case of first impression.

Mr. Iouna was represented by Attorney Stephen Ludwick. Petitioner had much earlier consulted with Mr. Ludwick with respect to this same case and made full disclosure to him of information he believed would be protected by the attorney-client privilege. The attorney-client relationship between the petitioner and Mr. Ludwick was eventually terminated.

Therefore, at trial, petitioner found himself in a set of circumstances which could only be termed bizarre. A chief prosecution witness, with ample reason to fabricate, was being represented by an attorney to whom the petitioner had spoken openly and candidly under the cloak of confidentiality.

Yet there was no case law to cover such a situation. Since Mr. Ludwick was not actually representing a party in suit against the petitioner, he could not be objected to on grounds of conflict of interest. In any event, it was not Mr. Ludwick's testimony which petitioner sought to have suppressed, but rather the testimony of the one individual to whom Mr. Ludwick might have unconsciously provided confidential information.

Thus, petitioner moved that Mr. Iouna's testimony be suppressed, and his motion was denied on the grounds that he had not made a sufficient showing to the court that the information Mr. Iouna proposed to give could only have come through a breach of the confidential relationship. Such a showing would clearly not be required if Mr. Ludwick were proposing to testify. There is no justification for requiring such a showing in the case of Mr. Iouna.

Opinions Below.

The decision of the United States Court of Appeals for the Eleventh Circuit denying petition for rehearing was issued without written opinion on February 10, 1982, and is unreported.

The decision of the United States Court of Appeals for the Fifth Circuit, Unit B, denying petitioner's appeal on error was issued on November 2, 1981 (*United States* v. *Sandini*, No. 79-5738).

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions Involved.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ..

Statement of the Case.

On July 17, 1979, the petitioner — along with some fifteen others — was charged in a four-count indictment alleging: (1) possession with intent to distribute marijuana; (2) importing

marijuana; (3) conspiracy to possess with intent to distribute marijuana; and (4) conspiracy to import marijuana. The petitioner was arraigned on August 10, 1979, and entered a plea of not guilty.

Trial commenced on December 10, 1979, and continued through December 14, 1979. At trial, Mr. James Iouna was called by the Government to testify against the petitioner. At that point in time, Mr. Iouna was a previously convicted co-conspirator. Mr. Iouna had agreed to testify against the petitioner in exchange for the Government's recommendation of a lenient sentence. Petitioner moved that Mr. Iouna's testimony be suppressed on the grounds that Mr. Iouna was being represented by Attorney Stephen Ludwick, the same Stephen Ludwick whom petitioner had originally consulted and to whom he had made full disclosure of all pertinent facts.

The trial court denied petitioner's motion, and on December 14, 1979, the jury returned a verdict of guilty. Petitioner appealed the verdict on the grounds that the trial court had committed reversible error in admitting the testimony of Mr. Iouna. On November 2, 1981, the appeal was denied and the conviction upheld. Petitioner filed a petition for a rehearing en banc, which was subsequently denied on February 10, 1982, without a written opinion.

Reasons Why the Writ Should be Granted.

The heart of this petition can be found in the following portion of the opinion rendered by the United States Court of Appeals regarding petitioner's assertion that Mr. Iouna's testimony should not have been allowed:

> The Court is unwilling to make a ruling presumptively that Mr. Ludwick has breached a confidence . . ..
>
> . . . . . .

> There would have to be some showing to this Court that the information Mr. Iouna proposes to give was information that only could have come through a breach of confidential relationship. The fact that both had the same lawyer is not enough in this Court's opinion to preclude one co-defendant from testifying against another co-defendant.

United States v. *Sandini*, 660 F.2d 544, 546 (5th Cir. Nov. 2, 1981).

Petitioner argues that such a view is contrary to controlling precedent and underlying public policy.

The principle is well established that an attorney should be disqualified from opposing a former client, if during his representation of that client he obtained information "relevant to the controversy at hand", *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 353 (S.D. N.Y. 1955), or "pertaining to the pending matter", *General Motors Corp.* v. *New York*, 501 F.2d 639, 651 (2d Cir. 1974). The test for such "relevance" or "pertinence" was laid down in *T. C. Theatre Corp.* v. *Warner Bros. Pictures*, 113 F. Supp. 265, 268-269 (S.D. N.Y. 1953), in which the court declared:

> I hold that the former client need show more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are *substantially related* to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. *It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of*

> *absolute fidelity be enforced and the spirit of the rule relating to privileged communication be maintained.* [Emphasis supplied.]

Both this "substantially related" test and its rationale have been endorsed and adopted in other decisions. *See, e.g., Brennan's, Inc.* v. *Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979); *Wilson P. Abraham Const. Corp.* v. *Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977).

Petitioner contends that if the "substantially related" test is to have any meaning as a legal principle and any value as a legal precedent, then that same standard must be applied to a derivative claim seeking to suppress evidence forthcoming from the compromised attorney's subsequent coconspirator client. That is, if *Brennan's, supra*, and *Abraham Constr., supra*, are to have precedential worth as having adopted this "substantially related" test, then that test should have been applied to the facts in the instant case. Without such application, petitioner contends that the fundamental principles of justice and equity are violated. As has been stated:

> The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.

Emle Industries, Inc. v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973).

Clearly, there is no question that a "lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a conflict of interest or a possible violation of confidence, even though this may not be true in fact." ABA Comm. on Professional Ethics, Opinions No. 885 (1965). The problem arises not in the area of recognizing the potential for a conflict of interest, but rather in the area of remedial measures to be taken. Petitioner contends that, given the facts of the instant case, to disqualify an attorney from participation in a trial, while allowing the party to whom he would most likely have conveyed confidential information, either consciously or unconsciously, to then testify at that same trial, reduces the safeguards of *Brennan's* and *Abraham Const.* to mere illusions. Surely, testimony which is tainted remains tainted, regardless of how many generations removed from the original source of contamination. *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963).

Petitioner contends that if disqualification of an attorney is proper on the basis of the appearance of an impropriety, then it must follow that those individuals, whether they be fellow counsel or subsequent coconspirator clients, who have had a close relationship on a "substantially related" case, must also be disqualified on that same basis. Such a view might appear harsh, but without such a corollary, the policy underlying the overall disqualification rule becomes meaningless. To insist that, as a result of second-generation taint, the burden should be shifted to the petitioner to make a showing that information has actually been divulged is to totally contradict the reasoning used in *Emle*, *supra*, *Brennan's*, *supra*, and *Abraham Const.*, *supra*.

> Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled re-

sponse to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved.

Emle, supra, at 571.

Conclusion.

For all the foregoing reasons, petitioner respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

UNITED STATES of America,
Plaintiff-Appellee,
v.
H. B. SANDINI,
Defendant-Appellant.

No. 79-5738.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Nov. 2, 1981.

Defendant was convicted in the United States District Court for the Southern District of Alabama at Mobile, William Brevard Hand, J., of conspiracy to possess with intent to distribute marijuana, importation of marijuana and conspiracy to import marijuana. Defendant appealed. The Court of Appeals, Henderson, Circuit Judge, held that: (1) where it was testified that counsel agreed to represent defendant and two codefendants but later counsel recommended that defendant and one codefendant be represented by separate counsel, but defendant instead of moving for disqualification of such first-mentioned counsel moved for suppression of testimony of a witness who was later represented by such counsel and who testified against defendant, District Court did not err in approaching problem during in camera hearing and in essentially placing burden on defendant to demonstrate that counsel had abused relationship or that defendant had been prejudiced, and, there being no indication that counsel

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 — October 14, 1980.

divulged to such witness confidential communications or that testimony was tainted by such disclosure, there was no error, and (2) in view of overwhelming evidence against defendant, any error in allowing Government's witnesses to testify as to amount of cash carried by defendant was harmless beyond a reasonable doubt and it was thus unnecessary to determine whether evidence of the money should have been suppressed.

Affirmed.

1. Attorney and Client — 21

Where it was testified that counsel agreed to represent defendant and codefendants but later counsel recommended that defendant and one codefendant be represented by separate counsel, but defendant instead of moving for disqualification of such first-mentioned counsel moved for suppression of testimony of witness who was later represented by such counsel and who testified against defendant, district court did not err in approaching problem during in camera hearing and in essentially placing burden on defendant to demonstrate that counsel had abused relationship or that defendant had been prejudiced, and, there being no indication that counsel divulged to such witness confidential communications or that testimony was tainted by such disclosure, there was no error. U.S.C.A. Const. Amend. 6.

2. Criminal Law — 1169.1(7)

In view of overwhelming evidence against defendant, in prosecution for conspiracy to possess with intent to distribute marijuana, importation of marijuana and conspiracy to import marijuana, any error in allowing Government's witnesses to testify as to amount of cash carried by defendant was harmless beyond a reasonable doubt and it was thus unnecessary to determine whether evidence of the money should

have been suppressed. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1002(a), 1013, 21 U.S.C.A. §§ 846, 952(a), 963.

Appeal from the United States District Court for the Southern District of Alabama.

Before GODBOLD, Chief Judge, MORGAN and HENDERSON, Circuit Judges.

HENDERSON, Circuit Judge:

This appeal stems from the same fact situation underlying the companion case of *United States* v. *DeSimone*, slip op. p. ____, ____ F.2d ____ (5th Cir. 1981). The appellant, H. B. Sandini, was tried separately and ultimately convicted of conspiracy to possess with intent to distribute marijuana, 21 U.S.C.A. § 846; importation of marijuana, 21 U.S.C.A. § 952(a); and conspiracy to import marijuana, 21 U.S.C.A. § 963. We affirm his conviction.

[1] Our main concern on this appeal is Sandini's contention that his conviction is invalid due to a problem that developed at trial which he labels both a conflict of interest and a violation of the attorney-client privilege. Sandini moved in the district court to suppress testimony of James Iouna, a previously convicted coconspirator. Iouna agreed to testify against Sandini in exchange for the government's recommendation of a lenient sentence. At this point in the overall proceedings, although not at his own trial, Iouna was represented by an attorney named Steven Ludwick.

Sandini maintains that he consulted with Ludwick shortly after his arrest, and that Ludwick agreed at that time to repre-

sent him as well as two co-defendants, William Thomas Craig and Robert Anthony DeSimone, in an impending state prosecution. Ludwick thereafter learned that the federal government planned to prosecute these individuals under a conspiracy theory, and he advised Sandini and Craig to retain separate counsel. However, Sandini contends that by that time he had fully disclosed to Ludwick the pertinent facts relating to the charges against him.

Given this sequence of events, we believe that Sandini's objections to Ludwick's later representation of a witness who testified against him are well-founded. He points to two cases which involved similar considerations. In *United States* v. *Kitchin*, 592 F.2d 900 (5th Cir.), *cert. denied*, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979),[1] an assistant United States attorney who had actively participated in the pre-indictment investigation into the defendant's criminal activities became an associate in the defense counsel's law firm prior to the trial. Similarly, in *United States* v. *Ostrer*, 597 F.2d 337 (2d Cir. 1979), the defendant was represented by a former federal prosecutor who had previously been involved in the related investigations and prosecutions of three persons whom the government intended to call as witnesses. In each case, the government successfully moved for disqualification of the defendant's chosen counsel.

These cases are factually analogous, although certainly not identical, to the one here.[2] Nevertheless, we have difficulty

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[1] Interestingly enough, Mr. Ludwick was the central figure in the *Kitchin* controversy also.

[2] To be distinguished are cases such as *U.S.* v. *Martinez*, 630 F.2d 361 (5th Cir. 1980), and *U.S.* v. *Alvarez*, 580 F.2d 1251 (5th Cir. 1978), where the defendants were denied effective assistance of counsel because their own trial attorneys either previously or simultaneously represented witnesses who testified against them. Sandini's trial counsel was not laboring under any conflict of interest and there is no contention that his representation was in-

in applying their rationales here because Sandini sought suppression of Iouna's testimony rather than the disqualification of Ludwick.

The district court approached this problem during an *in camera* hearing in which Sandini was allowed to testify to the nature of his earlier contacts and consultations with Ludwick. The court found that, assuming the truth of Sandini's statements, an attorney-client relationship had developed between these two men. However, the judge then essentially placed the burden on Sandini to demonstrate that Ludwick had abused that relationship:

> The Court is unwilling to make a ruling presumptively that Mr. Ludwick has breached a confidence that might have existed between Mr. Sandini and Mr. Ludwick. . . .
>
> . . . . . .
>
> There would have to be some showing to this Court that the information Mr. Iouna proposes to give was information that only could have come through a breach of confidential relationship. The fact that both had the same lawyer is not enough in this Court's opinion to preclude one co-defendant from testifying against another co-defendant.

(R. 676, 678). The district court examined Iouna's proffered testimony and concluded that it consisted entirely of matters that could only have been known to him by virtue of his own participation in the criminal scheme. Our own reading of this

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effective. Rather, any possible conflict arises from Ludwick's representation of Iouna after he had at one time consulted in a professional capacity with Sandini in connection with this same criminal case.

statement and of Iouna's actual trial testimony convinces us that this assessment was correct. There is absolutely no indication that Ludwick divulged to Iouna confidential communications between him and Sandini, or that Iouna's testimony was tainted by such a disclosure.[3] Moreover, Sandini was unable or unwilling to particularize to the court the manner in which he felt he was prejudiced. Under the particular circumstances of this case, we believe the district court properly denied the motion to suppress Iouna's testimony.[4]

[2] There is one other assignment of error to which the parties devoted considerable attention both at oral argument and in their briefs. Sandini insists that the district court erred in failing to suppress evidence of certain monies, totaling over $16,500.00, which were discovered on this person and in his car at the time of his arrest. We agree with the district court's

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[3] Cf. *Hunydee* v. *U.S.*, 355 F.2d 183 (9th Cir. 1965), where the Ninth Circuit held that the admission of testimony which consisted of the defendant's *statements* to his attorney constituted error.

[4] Accord, *U.S.* v. *Sander*, 615 F.2d 215 (5th Cir. 1980). There, the attorney originally retained by the appellant was murdered shortly thereafter. Because the appellant was mentioned as a possible suspect in the murder, the police procured his file from the attorney's office and glanced through it. The appellant moved for dismissal of the indictment, alleging a violation of his Sixth Amendment right to counsel. The district court conducted an *in camera* hearing during which the appellant expressed his concern about a handwritten statement which he had given the attorney. The police officer who examined the file testified that he did not see such a document, that he did not discuss the file with any federal agents, and that he supplied no evidence to the government. No information secured from the file was ever used against the appellant at his trial. Having reviewed these facts, this court affirmed the conviction, explaining:

> Where there is an intrusion on the attorney-client relationship the remedy for such a violation is not dismissal but the suppression of any evidence so obtained. . . . Appellant Sander made no showing of injury or prejudice because of the fact that his file at his attorney's office was viewed by the El Paso police and the Court below properly denied his motion to dismiss.

Id. at 219 (citations omitted).

observation that this issue is somewhat of a "tempest in a teapot." It is undisputed that the state authorities who seized the money did not have a warrant at the time of the search. It is also agreed that the warrant they obtained for Sandini's arrest was ultimately determined to be invalid. The point of contention argued by the parties at great length is whether the arrest and the search incident thereto were supported by independent probable cause. We see no need to delve into this inquiry. Clearly, any error in allowing the government's witnesses to testify as to the amount of cash carried by Sandini was harmless beyond a reasonable doubt. The evidence against him was overwhelming, and this particular testimony was probably among the least damaging of the lot. *See United States* v. *Marcantoni*, 590 F.2d 1324, 1339-31 (5th Cir. 1979); *United States* v. *Hall*, 587 F.2d 177, 182 (5th Cir. 1979); *United States* v. *Gramlich*, 551 F.2d 1359, 1364 (5th Cir. 1977). We also reject Sandini's assertion that the invalid arrest warrant was a product of prosecutorial misconduct, and that suppression was mandated for this reason.

As for Sandini's constitutional challenge to the classification of marijuana as a controlled substance, he fares no better than did the appellants in the companion case. *See United States* v. *DeSimone*, slip op. p. ____, ____ F.2d ____, ____ (5th Cir. 1981). We also conclude that his objections to the testimony of government witnesses on hearsay and relevancy grounds fail to demonstrate reversible error.

For the foregoing reasons, the judgment of conviction is AFFIRMED.